No. 89-275

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1989

COOTER & GELL,

Petitioner,

v.

HARTMARX CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE LEGAL AFFAIRS COUNCIL AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii

INTEREST OF THE LEGAL AFFAIRS COUNCIL 1

SUMMARY OF ARGUMENT 3

ARGUMENT. 5

THE APPROPRIATE STANDARD FOR APPELLATE REVIEW OF ALL RULE 11 ISSUES IS FOR ABUSE OF DISCRETION. 5

A. Due To The Fact-Intensive Nature of Rule 11 Cases, District Court Decisions Deserve Great Deference. . 9

B. No Purpose Is Served By Requiring De Novo Review of Rule 11 Cases 18

CONCLUSION. 21

TABLE OF AUTHORITIES

Page

Cases:

Adamson v. Bowen, 855 F.2d 668 (10th Cir. 1988). 16

Anderson v. Bessemer City, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). 20

Avirgan, et al. v. Hull, et al., 705 F.Supp. 1544, clarified, 125 F.R.D. 185 (S.D. Fla. 1989). 2

Century Products, Inc. v. Sutter, 837 F.2d 247 (6th Cir. 1988). . . 16

Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987) 14

Eastway Construction Corp. v. City of New York, 762 F.2d 243 (2nd Cir. 1985) 10, 14

FDIC v. Tekfen Construction and Installation Co., Inc., 847 F.2d 440 (7th Cir. 1988) 16

Kale v. Combined Insurance Co., 861 F.2d 746 (1st Cir. 1988). . . 16

Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928 (7th Cir. 1989) (en banc) . . . . . passim.

O'Connell v. Champion International Corp., 812 F.2d 393 (8th Cir. 1987) 16

Robinson v. National Cash Register Co., 808 F.2d 1119 (5th Cir. 1987) 12

Stevens v. Lawyers Mutual Liability Insurance Co., 789 F.2d 1056 (4th Cir. 1986) 16

Teamsters v. Cement Express, Inc., 841 F.2d 66 (3rd Cir. 1988), cert. denied, __ U.S. ____, 109 S.Ct. 128 (1988). 16

Thomas v. Capital Security Services, Inc., 836 F.2d 866 (5th Cir. 1988) (en banc) 6, 11, 12, 13

Westmoreland v. CBS, Inc., 770 F.2d 1168 (D.C. Cir. 1985). . 14, 15

Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986). . . 9

Rules:

Fed. R. Civ. P. 11. . . . . passim.

Other Authorities:

Shaffer, Sanctions: Rule 11 and Other Powers (2d ed. 1988). . . . 13

Advisory Committee Notes to 1983 and to Fed. Rules of Civ. Pro., 97 F.R.D. 165 (1983). . . . . passim.

Federal Practice Advisory, Issue 32, November 12, 1989 . . . 5

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INTEREST OF THE LEGAL AFFAIRS COUNCIL

The Legal Affairs Council is a non-profit organization dedicated to preserving the inherent and Constitutional rights of the people. Of highest priority to the Legal Affairs

Council is the protection of individual liberties guaranteed by the First Amendment to the Constitution; freedom to worship, freedom of speech and press, freedom to peaceably assemble and associate, and to petition the government for a redress of grievances.

Increasingly, during the last two decades, organizations and individuals opposed to certain fundamental American freedoms and institutions have filed frivolous lawsuits of a political nature against individuals and organizations working in support of those freedoms and institutions. As a result of these political lawsuits, individuals and groups have been forced to defend their political views in courtrooms--instead of in free debate--and at great expense. See, e.g., Avirgan, et al. v. Hull, et al., 705 F.Supp. 1544, clarified, 125 F.R.D. 185 (S.D. Fla. 1989). The courts

were not designed to be arbitrators of political policy disputes. Therefore, it is in the interest of the Legal Affairs Council to support the practice of deferring to U.S. district court judges' discretion concerning the propriety of granting sanctions against those who file groundless lawsuits to gain political ends. De novo appellate review of Rule 11 cases will encourage the misuse of the court system by allowing frivolous suits to be, in effect, relitigated at the appellate level at still greater cost to both the individual and the system.

SUMMARY OF ARGUMENT

The case before this Court is an example of the intensely factual nature of the inquiry that commonly is performed by a district court applying Rule 11 of the Federal Rules of Civil Procedure. During the six years since Rule 11 was

amended, the majority of circuit courts of appeals have ruled that great deference must be given district court decisions on questions of frivolous filings since district judges are in the best position to evaluate the evidence and to make findings based on varying factual patterns. District courts, furthermore, have the primary interest in and feel the primary effect of Rule 11 violations. Many factors are considered by judges deciding whether or not certain pleadings or conduct rise to a level warranting sanctions. Those determinations can best be made at the district court level, reviewable, certainly, but for an abuse of discretion.

An appellate court is not in an equal position to judge the conduct under review in a district court. It is a waste of judicial resources to require de novo review of Rule 11 district court

decisions in any aspect, when a deferential review adequately safeguards the rights of litigants. Additionally, de novo review would fail to produce useful legal precedent in Rule 11 cases since the fact pattern under investigation will always vary, rendering a fact-bound judgment of little use in subsequent Rule 11 cases.

ARGUMENT

THE APPROPRIATE STANDARD FOR APPELLATE REVIEW OF ALL RULE 11 ISSUES IS FOR ABUSE OF DISCRETION.

Since the amendment of Rule 11 in 1983, there have been more than fifteen hundred reported cases concerning the imposition of sanctions for filing frivolous pleadings. Federal Practice Advisory, issue No. 32, November 13, 1989, Page 1. The potential impact on the appellate system, through sheer

numbers, is staggering if each case demands de novo review. Though adopted by a minority of circuits and argued by Cooter & Gell in the petition presently before this Court, it is difficult to envision how de novo review of whether "the facts constitute a violation" furthers the purposes and goals of Rule 11. Petitioner's Brief at 31. "The perspective of the district court is singular;" the district court has the intimate familiarity with the parties and issues to be in the better position to judge the conduct of the parties. Thomas v. Capital Security Services, Inc., 836 F.2d 866, 873 (5th Cir. 1988) (en banc). In addition, it is the responsibility of the district court to secure the effective operation of its system. Advisory Committee Notes to 1983 Amendments to Federal Rule of Civil Procedure 11 [hereinafter Advisory Committee

Notes]. To require appellate courts to conduct de novo review of these fact-intensive cases runs contrary to assuring that the efficiencies of operation promoted by Rule 11 are not offset by the cost of satellite litigation over the imposition of sanctions. Whether certain conduct and certain facts rise to the level of sanctionable conduct under Rule 11 is inevitably a judgement call, properly reviewable only for abuse of discretion. Mars Steel Corp. v. Continental Bank N.W., 880 F.2d 928, 934 (7th Cir. 1989) (en banc).

Though it is argued that certain Rule 11 disputes may be reviewed solely with reference to documents filed with the district court, the present case on appeal certainly does not fall within that category. The case before this Court is fact intensive, as are most Rule

11 cases. A de novo review as to whether the facts warrant the imposition of sanctions will not produce a valuable precedent as the establishment of a rule of law is not at stake. On the contrary, requiring de novo review on appeal would likely result in the circuit court "sink[ing] many hours into the case without duplicating the district court's feeling for the situation, and without generating an opinion having the slightest significance for tomorrow's disputes". Mars Steel Corp. v. Continental Bank N.A., 880 F.2d at 934. This would hardly conserve judicial resources and clearly ignores the normal division of labor between the district courts and the circuit courts. Id.

A. Due To The Fact-Intensive Nature of Rule 11 Cases, District Court Decisions Deserve Great Deference.

The 1983 amendment of Rule 11 was intended to reduce the evident reluctance of federal judges to impose sanctions, by emphasizing the responsibility of attorneys and setting an objective standard for the imposition of sanctions by the court. Advisory Committee Notes. Since 1983, a split of authority in the circuits has developed concerning the appropriate standard of review under the amended Rule 11.

The standard adopted by the Ninth Circuit and argued by Cooter & Gell in the present case, involves a three-tiered approach to appellate review. In Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986), the Ninth Circuit applied a clearly erroneous standard to factual questions, de novo review for application of law to the

findings of fact and reserved the abuse of discretion standard for review of the district court's selection of appropriate sanctions. Though basing its declaration of a standard of review on a need for consistency with "similar situations," and believing its decision to be consistent with Second, Fifth and Seventh Circuit decisions, the Ninth Circuit actually stands alone in its standard for Rule 11 appellate review.

Notwithstanding the Zaldivar assessment of the standard in the Second Circuit, that circuit adheres to a two-tiered standard as enunciated in Eastway Construction Corp. v. City of New York, 762 F.2d 243, 254 n.7 (2nd Cir. 1985). "Where the only question on appeal becomes whether, in fact, a pleading was groundless, we are in as good a position to determine the answer and, thus, we need not defer to the lower court's

opinion"; while the second tier of Eastway is that the factors considered in determining the nature and extent of the sanctions imposed will receive an abuse of discretion review. Id. The flaw in the Eastway court's reasoning is that it requires a de novo review of legal conclusions which, of necessity, rest on a scaffold of factual findings. The result will force appellate courts into the role properly reserved to trial courts.

The Fifth and Seventh Circuits, post-Zaldivar, have both abrogated a multi-tiered approach and have unequivocally adopted an across-the- board abuse of discretion standard of review. Mars Steel Corp. v. Continental Bank N.A., 880 F.2d at 933; Thomas v. Capital Security Services, Inc., 836 F.2d at 872. While the Seventh Circuit in Mars Steel compares a Rule 11 appeal to the appeal of a decision concerning a tort action,

in which findings of fact are disturbed only if "clearly erroneous," the Seventh Circuit decides that it will stand with six other circuit courts and employ full deferential review "including [to] the application of legal rules to facts". Id.

After having applied the three-tiered approach in Robinson v. National Cash Register Co., 808 F.2d 1119, 1125-26 (5th Cir. 1987), the Fifth Circuit clearly abandoned that approach in Thomas v. Capital Security Services, Inc., 836 F.2d at 872, by finding that although the use of the imperative "shall impose . . . an appropriate sanction . . ." contained in Rule 11 can broaden the scope of appellate review, the rule should not be interpreted to remove the district court's necessary use of discretion on any issue arising in a Rule 11 case, "discretion which it must

enjoy to effectively regulate its courtroom." In abandoning the de novo standard, the Fifth Circuit cites the opinion of C. Shaffer, Jr. and P. Sandler, Sanctions: Rule 11 and Other Powers, at 28-29 (2d ed. 1987), that those circuits retaining de novo review do so most probably in an effort to attain uniformity in the evolving law of sanctions, "but the goal of uniformity may be no better served by the de novo standard because many sanctions cases are fact-intensive, close calls." Id. The Fifth Circuit declined to view the conduct of the litigants as if they were "litigating their case initially on the appellate level". Thomas v. Capital Security Services, Inc., 836 F.2d at 872.

The Eleventh and District of Columbia Circuits join the Second Circuit in applying the de novo standard to whether a pleading or motion is legally

sufficient while reserving to the district court's discretion the determination of whether factual, dilatory or bad faith reasons exist to impose Rule 11 sanctions. Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174-75 (D.C. Cir. 1985). While under Zaldivar, the Ninth Circuit reviews de novo the district court's legal conclusion that a particular set of facts rises to the level of sanctionable conduct, the District of Columbia, Eleventh and Second Circuits apply de novo review to the narrow question of whether a pleading or motion is legally sufficient. Id.; Donaldson v. Clark, 819 F.2d at 1556; Eastway Construction Corp. v. City of New York, 762 F.2d at 254 n.7.

Those circuits applying de novo review to legal sufficiency of a pleading or motion appear to do so in response to

the mandatory language contained in the amended Rule 11: "the court 'shall impose' sanctions." Westmoreland v. CBS, Inc., 770 F.2d at 1174. There is no difference however, between the Rule 11 directive and the rule of law in negligence cases that if a trial court finds negligence, it shall afford the injured party a remedy. Mars Steel Corp. v. Continental Bank N.A., 880 F.2d at 935. The requirement in tort of "if violation then remedy" does not dictate de novo review on appeal of fact specific tort cases. Id. (emphasis in original). There is no compelling reason why the same tenet should not apply in Rule 11 cases.

The remaining circuits have adopted an across the board abuse of

discretion standard.[1] In doing so, the First Circuit stated that it found persuasive the argument that the abuse of discretion standard lends itself to "ease in application and . . . vests the lion's share of the responsibility for imposing Rule 11 sanctions with the judicial actor closest to the litigation--the district judge." Kale v. Combined Insurance Co., 861 F.2d at 758. While acknowledging the mandatory language in the Rule, the First Circuit determined that it could not "escape the fact that at its core imposition of sanctions is 'a judgment call'." Id., (citing FDIC v. Tekfen Construction

[1] Kale v. Combined Insurance Co., 861 F.2d 746, 758 (1st Cir. 1988); Teamsters v. Cement Express, Inc., 841 F.2d 66, 68 (3rd Cir. 1988); Stevens v. Lawyers Mutual Liability Insurance Co., 789 F.2d 1056, 1060 (4th Cir. 1986); Century Products, Inc. v. Sutter, 837 F.2d 247, 253 (6th Cir. 1988); O'Connell v. Champion International Corp., 812 F.2d 393, 395 (8th Cir. 1987); Adamson v. Bowen, 855 F.2d 668, 673 (10th Cir. 1988).

and Installation Co., Inc., 847 F.2d 440, 443 (7th Cir. 1988).

Appellate courts have traditionally accorded deference to the factual findings of the trial court that require deference in Rule 11 cases. These cases are fact intensive. Although the 1983 amendment of the Rule created an objective rather than subjective standard against which the litigants' conduct is measured, the determination that: (1) a pre-filing inquiry was reasonable, (2) that sufficient facts support a claim, or (3) that the paper was filed for an improper purpose, requires judgement based on the underlying facts. It will always be a question of degree. The district court develops a familiarity with trial counsel, norms of practice in the jurisdiction, the litigants and the issues; this familiarity cannot be duplicated on appeal. The district court has

an immediate need to ensure that its court is not abused by parties; it is the court's own time that is wasted when a paper in violation of Rule 11 is filed and argued. It is in the district court's best interest to ensure that the litigation before it fulfills the letter of Rule 11; and the district court is in the best position to achieve that end.

This is not to imply that appellate review rubber stamp district court Rule 11 findings. However, deference must be given to a finding made by the court with a greater interest in and opportunity to observe Rule 11 cases.

B. **No Purpose Is Served By Requiring De Novo Review of Rule 11 Cases.**

Rule 11 was promulgated to enable more efficient use of the court system. See Advisory Committee Notes. But there is concern that the efficiencies affected

might be offset by "satellite litigation over the imposition of sanctions". Id. What better way to ensure that litigation over Rule 11 sanctions multiply than to afford the Rule 11 litigant de novo review of the facts giving rise to a sanction; in effect, giving a second bite at the apple, and turning the appellate court into a trial court. The rights of appellant are safeguarded by deferential review of the district court decision. The appellate court cannot have the same insight as does the district court, nor has it the same interest in the outcome.

> Fact intensive disputes, those whose resolution is unlikely to establish rules of future conduct, are reviewed under a deferential standard because the role of appellate courts in establishing and articulating rules of law is not at stake. District judges have the best information about the patterns of their cases, information appellate judges could duplicate only at great cost in time. . . . Even when the dispute may be resolved by examining documents, the claim

> that the court of appeals is in as good a position as the district judge to review a written record disregards the division of labor (why should three judges redo the work of one?), . . . and . . . would not produce a valuable precedent.

Mars Steel Corp. v. Continental Bank N.A., 880 F.2d at 933-34 (citing Anderson v. Bessemer City, 470 U.S. 564, 573-76, 105 S. Ct. 1504, 1511-13, 84 L. Ed.2d 518 (1985).

Requiring de novo review of Rule 11 issues will not produce a better decision since the most complete information necessary for that decision was available at the district court, not the circuit court. In these fact-intensive cases, an appellate judgment will have no value as a rule of law. De novo review increases the expenditure of judicial resources needlessly since review for abuse of discretion adequately safeguards the rights of the parties.

CONCLUSION

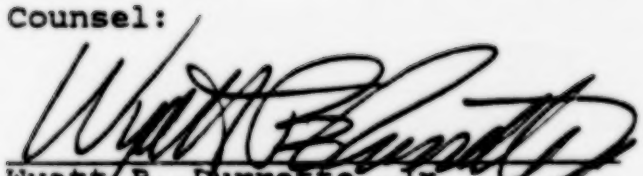
For the reasons expressed above, the appropriate standard of review for all Rule 11 issues should be review for abuse of discretion only. That finding would produce the best decisions in these fact-intensive cases, and also best suits the purposes for which Rule 11 was enacted.

It is respectfully submitted that the decision below on this issue should be affirmed and the relief sought by the respondent should be granted.

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